IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 5067 OF 2003
IN
CRIMINAL APPEAL NO. OF 2003

M/s.Bhagyashree Steel Centre. ... Applicant.

V/s.

M/s.Tigon Pipe Benders Pvt.Ltd.
and others. ... Respondents.

S.D.Thokade for the petitioner.

R.T.Parekh for respondent Nos.1 to 3.

D.P.Adsule for the State.

CORAM : V.M. KANADE, J.

DATED : 17th February, 2005.

P.C. :

. Heard learned counsel for the appellant and learned counsel for the respondents.

2. The appellant is challenging the order passed by the Judicial Magistrate, First Class, Pune dismissing his complaint under section 256 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for want of prosecution. Learned counsel for the appellant submits that the matter was on board on 23rd September 2003 and it was adjourned to 4th October 2003. There was misconception in the minds of the appellant and his advocate that the matter was adjourned to 4th October 2003 on account of endorsement made by the Clerk of the Court on the

board. Learned counsel for the appellant submits that on 4th and 5th October 2003 the matter did not appear on the board as 4th and 5th October 2003 were holidays. It is submitted that on the next date i.e. on 6th October 2003 learned counsel for the appellant made an enquiry in the Magistrate's Court after 1.30 p.m. and he came to know that his complaint was dismissed for want of prosecution. He, therefore, immediately made an application at 2.15 p.m for restoration of the complaint. However, his application was rejected. The appellant has filed this appeal against the said order passed by the Magistrate.

3. Learned counsel for the appellant submits that there was a misconception in the minds of the appellant and its counsel that the case was adjourned to 4th October 2003 and the complainant was under bonafide impression that next date will be given on 6th October 2003. He submitted that learned Magistrate ought to have given chance to the complainant to file its say before passing the order under section 256 of Cr.P.C.

4. Learned counsel for the respondents vehemently opposed the submissions made by learned

counsel for the appellant. He submitted that the appellant has made incorrect statement in paragraphs 2 and 3 of the appeal memo. He submitted that the appellant has mentioned that on 23rd September 2003 the case was adjourned to 4th October 2003 and that 4th and 5th October 2003 were holidays. He submitted that 4th October 2003 was a working Saturday and, thus, an incorrect statement was made by the appellant. He submitted that the complainant remained absent even on earlier dates and, therefore, the Magistrate had properly exercised his discretion vested in him under section 256 of Cr.P.C. He, therefore, submits that this appeal be dismissed and the impugned order be confirmed. Learned counsel for the respondents further submits that a right had accrued in favour of the accused on dismissal of the complaint which was a substantive right and, therefore, this Court should not exercise its discretion under section 378 of Cr.P.C.

5. I have heard learned counsel for the appellant and learned counsel for the respondents. Leave to appeal is granted. Appeal is taken up for hearing forthwith.

6. It is no doubt true that there is no evidence on record to suggest that the matter, in fact, was adjourned to 4th October 2003 apart from the zerox copy of the board which is annexed at Exh.A to the appeal memo. The Magistrate in his discretion had given opportunity to the appellant on an application being made by the accused for dismissing the complaint. Since the complainant did not remain present on the second call he dismissed the said application under section 256 of Cr.P.C. However, considering the facts and circumstances of the case that on earlier occasion exemption was granted by the trial Court to the complainant and that the appellant and its counsel were under some kind of misconception, the ground given by the appellant appears to be plausible ground. The appellant and its counsel immediately appeared in the trial Court on 6th October 2003 itself at 2.15 p.m. and an application was made for restoration of the complaint. In view of these circumstances, in my view, the order of the trial Court needs to be set aside. In the result, I pass the following order:

O R D E R

(i) The appeal is allowed.

(ii) The order of the trial Court dated 6th October 2003 is set aside. The complaint is restored to file on the condition that the appellant pays costs quantified at Rs.3,000/- to the respondents, which shall be paid as condition precedent within a period of two weeks from today. Costs to be paid directly to the respondents. If the costs are not paid within a period of two weeks from today this order of restoration of the complaint shall stand cancelled without further reference to the Court.

(iii) The trial Court is directed to decide the complaint as expeditiously as possible, at any rate, within a period of two months. In the event the complainant remains absent on the next of hearing, liberty is given to the Magistrate to dismiss the complaint by exercising jurisdiction under section 256 of Cr.P.C. The record and proceedings be sent back to the trial Court expeditiously within a period of two weeks from today.

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